## APPELLATE CIVIL.

*Before Addison and Bhide JJ.*

RAJA KHAN (DEFENDANT) Appellant

*versus*

MUHAMMAD KHAN AND OTHERS (PLAINTIFFS)
GHULAM MUHAMMAD AND OTHERS (DEFENDANTS) } Respondents.

1930

*Feb. 27.*

Civil Appeal No. 1570 of 1929.

*Punjab Pre-emption Act, I of 1913, section 22 (4)—Order of Court for deposit of one-fifth of purchase money—security bond filed instead and accepted by the Court—Subsequent order by Court rejecting the plaint for non-compliance with the order to deposit cash—whether order, accepting the bond varies previous order by implication—Second Appeal—question of law.*

In a pre-emption suit the plaintiffs, instead of depositing one-fifth of the purchase money by the 6th August 1928, as ordered by the Court, filed a security bond for payment of the purchase money whereupon the Court passed the following order: "*zamanat manzur hai, shamil misal howe.*" The hearing of the case was postponed to 15th September 1928 and in the meanwhile the trial Subordinate Judge was succeeded by another Subordinate Judge, who rejected the plaint under section 22 (4) of the Punjab Pre-emption Act on the ground that the plaintiffs had failed to comply with the Court's order requiring them to deposit one-fifth of the purchase money. The District Judge on appeal disagreed with the trial Court and held that the Subordinate Judge, having accepted the security bond, had by implication varied his previous order as regards cash payment.

*Held*, that the plaint must be rejected as there is no presumption that the Subordinate Judge varied his previous order by accepting a security bond instead of a cash deposit.

*Bahadur Shah* v. *Ahmad Shah* (1), and *Muhammad Hayat* v. *Raghubar Dial* (2), relied upon.

(1) (1924) I. L. R. 5 Lah. 492. (2) 67 P. W. R. 1916.

1930

RAJA KHAN
*v.*
MUHAMMAD KHAN.

*Held also,* that the finding of the District Judge could not be treated as one of fact, because it was based on a mere inference drawn from the acceptance of the security bond and could therefore be questioned in second appeal.

*Appeal from the order of* Mian *Ahsan-ul-Haq, District Judge, Attock at Campbellpur, dated the 22nd June 1929, reversing the decree of* Maulvi *Barkat Ali Khan, Senior Subordinate Judge, Attock at Campbellpur, dated the 11th January 1929, and remanding the case for a decision of the issues according to law.*

SHAMAIR CHAND, QABUL CHAND and MUHAMMAD AMIN, for Appellant.

NAND LAL, for Respondents.

BHIDE J.

BHIDE J.—This is an appeal arising out of a pre-emption suit. The material facts bearing on the only point which arises for decision in appeal are briefly as follows :—

On the institution of the suit, the Court ordered the plaintiffs to deposit one-fifth of the purchase money by the 6th August, 1928. On that date, instead of depositing the money as ordered, the plaintiffs filed a security bond for payment of the purchase money. Thereupon the Court passed the following order :— "*zamanat manzur hai, shamil misal howe.*" The hearing of the case was then postponed to the 15th of September 1928. In the meantime *Sayyad* Ghulam Yazdani, Subordinate Judge, who was trying the case, was transferred and was succeeded by another Subordinate Judge named *Munshi* Barkat Ali Khan. The latter proceeded with the trial of the suit and after some hearings evidence on both sides was concluded. At the time of arguments it was brought to the notice of the Subordinate Judge that the plaintiffs had failed to comply with the Court's order requiring them to

deposit one-fifth of the purchase money. The Court thereupon rejected the plaint under section 22 (4) of Punjab Pre-emption Act. The plaintiffs appealed to the District Judge who disagreed with the trial Court and held that *Sayyad* Ghulam Yazdani, having accepted the security bond on the 6th of August, 1928, had by implication varied his previous order as regards the cash deposit and the plaint was, therefore, not liable to be rejected. The appeal was accepted and the suit remanded for re-trial. From this decision the defendant-vendee has preferred this appeal.

The learned counsel for the appellant has contended that the decision of the learned District Judge is opposed to the law as laid down in *Bahadur Shah* v. *Ahmad Shah* (1) and *Muhammad Hayat* v. *Radhbar Dial* (2). It was urged, on the other hand on behalf of the respondents that those rulings are distinguishable and that in any case, the finding of the learned District Judge, being one of fact, cannot be challenged in this appeal.

After carefully considering the facts of this case and the rulings cited, I think this appeal should succeed The learned District Judge has tried to distinguish the rulings referred to above on the ground that the security bonds were filed in those cases after the dates on which they had been ordered to be filed and the only question involved therein was whether the Court had extended the time by implication by accepting the bonds. But the question in the present case also is similar, *viz.* whether there is any presumption that the learned subordinate Judge varied his previous order by accepting a security bond instead of cash deposit on the 6th of August, 1928. The learned counsel for the respondents pointed out that

(1) (1924) I. L. R. 5 Lah. 492. (2) 67 P. W. R. 1916.

1930

RAJA KHAN v. MUHAMMAD KHAN.

BHIDE J.

in the present case the learned Subordinate Judge had definitely passed an order to the effect *zamanat manzur hai* (security accepted) while in *Bahadur Shah* v. *Ahmad Shah* (1) the security bond had merely been ordered to be placed on the record. But it appears that in *Muhammad Hayat* v. *Raghbar Dial* (2) the security bond had been 'accepted' as in the present case. I, therefore, hold that the principle laid down in the above two rulings is applicable to the present case and the learned District Judge erred in law in holding that the acceptance of the security bond implied that the previous order for cash deposit had been varied.

The finding of the learned District Judge cannot be treated as one of fact because it is based on a mere inference drawn from the acceptance of the security bond. The plaintiffs had filed an affidavit that they had made an oral request to the Subordinate Judge that the security bond should be taken instead of cash deposit but the learned District Judge has apparently not accepted this affidavit as reliable. If any such oral request had been made and the Subordinate Judge had intended to vary his order he would in all probability have expressly said so.

I would, therefore, accept this appeal and setting aside the order of the learned District Judge restore that of the trial Court. The appellant will get his costs throughout.

ADDISON J.

ADDISON J.—I concur.

*A. N. C.*

*Appeal accepted.*

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